

HCLU Policy Papers on Abortion

Controversy on how permissive the abortion law should be – whether the fetus has a right to life from the moment of conception or should women freely decide on abortion – hots up from time to time in Hungary, just as in most of the democratic countries. Legislation on abortion must be equitable, honor human rights and be neutral between conflicting world views. There should be no arbitrary discrimination in the treatment either of the pregnant woman or that of her fetus. Moreover, it is a priority that the rights the constitution ensures for individuals must be honored. They may only be restricted in exceptional and justified cases. As people differ in religion, world view and moral values, it is inadmissible to base the rules on principles that can only be accepted by a section of society.

The Constitution protects privacy and personal self-determination

Hungary's Constitution, issued from the amendments of 1989, enumerates the freedoms and rights of the human person. Article 54 (1) provides that all persons have an innate right to human dignity. The Hungarian Constitutional Court has ruled that the right to dignity protects the autonomy of the individual in each case when no enumerated constitutional freedom is available.

In recent years, the Constitutional Court has defined several rights of the individual as based on the right to dignity: protection of privacy, the right to be informed of blood ties, the right to marriage, self-determination, and the general right to free action. In sum: the constitution protects privacy and ensures personal self-determination. It goes without saying that the Constitution devotes separate discussion to certain salient components of privacy. Here are some examples: the right to freedom and personal security (Article 55 [1]), the inviolability of private homes and the right of individuals to secrecy in private affairs (Article 59 [1]) and the freedom of religion and conscience (Article 60 [1]). It is an essential principle of the Constitution that the government shall not interfere with the individuals' decisions about their own lives and that the state has no business whatsoever in people's bedrooms.

The Constitution protects a woman's control over her body and course of life

The constitutional value of human dignity entails that each person has an exclusive control over his/her body. In addition, everybody has the right to seek what they consider as a good life and to choose the course of their life. Whoever is impeded in their control over their body and course of life is impeded in their self-determination.

It is a part of a woman's right of self-determination that she may make her own decision about pregnancy. Pregnancy is a process that takes place inside a woman's body. As long as a woman is pregnant, that exerts a decisive influence on every aspect of her life, including her identity. Hence it follows that when a woman is prevented from making her own decision on whether to carry her pregnancy to term, that affects the woman's self-determination in the most serious manner.

Whether or not a woman carries her pregnancy to term exerts a fundamental influence on her subsequent course of life. If the state obliges the woman to carry her pregnancy to term, the woman is prevented from making a vital decision autonomously, and thus a most fundamental right of hers is violated. Consequently, a woman's right of control over her body and course of

life is a vital issue as far as the legal aspects of abortion are concerned. This was borne in mind by the Constitutional Court when in 1991 it passed a resolution on the constitutional aspects of abortion. "Pregnancy entails such changes in the mother's body and – as a rule – the task of rearing a child exerts such an influence on the mother's subsequent course of life, says the resolution, that the Constitutional Court is of the conviction that even a partial restriction of the opportunity of an abortion has a direct and substantial impact on the mother's self-determination".

The state shall not pry into women's private affairs

That a woman voluntarily enters sexual intercourse does not necessarily mean that she wants to give life to a child. That a woman is aware of the possible consequence of sexual intercourse does not necessarily mean that she is willing to have a child. The decision to give life to a child is very often made *after* pregnancy is found out, and it usually occurs after the woman weighed the pros and cons of such a decision.

There are cases when giving life to a child would impose such a serious burden on the woman that the state must not expect her to bear, and it would not be justified to force on her. These are the cases which the Hungarian abortion law refers to as 'situation of grave crisis'. What do we mean by a serious burden? It can be a grave danger to the health or even the life of the mother or the fetus, traumatic memory of rape, or any other circumstance that would make the mother's life extremely difficult. Here are some examples to the last category: if the child were born, that would ruin the family financially, the mother could not continue her university studies, the father (who opposed having a child) would walk out on the woman. It is also conceivable that a woman learns after she became pregnant that the father of her fetus has also another partner. Under any of such circumstances either the family conditions or the financial conditions necessary for rearing a child are missing. In all cases when pregnancy creates a situation of grave crisis for the woman – whether it is a physical or emotional shock, or danger to her social status – in the first stage of her pregnancy the pregnant woman does have the right to abortion, according to the Hungarian law adopted in 1992.

The term 'situation of grave crisis' is an umbrella term covering a wide variety of circumstances. It is impossible to give an exhaustive catalogue of such circumstances. It would violate women's privacy and right to self-determination if the authorities pried into their private affairs. Moreover, it follows from the tenet that the state must be neutral in matters related to world views and that the citizens must enjoy the freedom of conscience that under no conditions may the state decide instead of the citizens what is a serious burden for them. Whether giving life to a child threatens women with a grave crisis must be decided by pregnant women themselves and not the public authorities or doctors.

In our view it is justified to expect pregnant women to act with a full sense of responsibility when deciding whether or not to give life to their children, and whether they have good reasons to request an abortion. We are convinced, however, that if, upon due consideration, a woman decides that carrying her pregnancy to term would lead to a situation of grave crisis, then that it is a good reason for the state to abstain from interfering with her choice.

The value of fetal life is also protected by the Constitution

In its 1991 ruling on abortion the Constitutional Court argued that the life of the fetus is protected by the constitution even if the state does not recognize it as a person who has rights. What the state protects is “human life as a value” and “human life in general and its conditions”. Hence it follows that the “state's duty to protect life covers human life in-the-making”. It should also be borne in mind that the fetus is a potential human being from the moment of its conception and, once a fetus develops sensory organs, interests may also be attributed to it. From a moral point of view however a fetus is not a person as it is not an active participant in the community of people in a moral sense. To protect the value of fetal life, the state may interfere with the way the woman practices her right of self-determination yet it may not justifiably overrule that right.

In the interest of protecting the value of fetal life, abortion may only be carried out in justified cases. In the first trimester of pregnancy, “a situation of grave crisis” is an adequate justification, according to the Hungarian law of 1992. In the middle stage of pregnancy the fetus is entitled to enhanced legal protection and, thus, stronger justification is required. In the final stage of pregnancy, when the fetus can be kept alive outside the mother's womb, abortion may only be carried out as a last resort: to save the mother's life. Respect for the life of the fetus requires certain restrictions on abortions. Honoring however the self-determination of pregnant women, in justified cases abortions have to be carried out.

The fetus differs from other human beings in that until the last weeks of pregnancy, it has to be inside the body of the pregnant woman. In other words, the pregnant woman has to accept the fact that the fetus is growing in her uterus, and that it relies on the functioning of the mother's heart, muscles and metabolism. In the course of pregnancy, the mother has to accomplish a serious task in a physical and emotional sense, reshuffle her lifestyle and, occasionally, undergo lasting bodily consequences. Consequently, the protection of the value of fetal life is always more restricted than that of the right to life of the human person.

In democratic countries there is a broad consensus on abortion

The legislation of the democratic countries of North America and Europe do not have a uniform approach to abortion. At one end of the scale abortions are radically restricted, and at the other, they are permitted without restrictions. Most of them are relatively permissive, however. In Canada and the United States abortion is a constitutional right in the first trimester of pregnancy. In most countries of Western Europe a wide range of justifications for abortion are accepted in the first trimester. Ireland, where there is a total ban on abortion on religious grounds, is an exception. In Central and Eastern Europe – with the exception of Poland, where abortion legislation is not stabilized yet – the abortion laws are relatively permissive just like in advanced Western democracies.

Attending a counseling center is in some countries a precondition for getting the permit to abortion. In the majority of countries where permission for abortion depends on whether the applicant can give a good reason, health considerations as well as a “situation of grave crisis” are accepted as such a reason. The term Germany's abortion law uses is *schwerwiegende Notlage* and the one in the French one is *situation de détresse*. Moreover, in Germany, since the 1995

resolution of the Constitutional Court, no one but the pregnant woman is allowed to decide whether she is in a *schwerwiegende Notlage*, and although counseling remains mandatory, the woman is not under the obligation to reveal her personal identity. In Belgium and Norway, abortion is available on demand in the first trimester of pregnancy, and the woman is not asked to give any reasons for her choice. Thus, there is broad consensus in the democratic countries on that in the first stage of pregnancy the self-determination of women should prevail, whereas in the final stage of pregnancy abortion is not permitted.

The case of Hungary

In Hungary following 1956 the abortion law was moderately permissive. The rules were made stricter in 1973, but in 1988 the last Communist government somewhat eased them. After the adoption of a new constitution in 1989 and the free elections in 1990, pro-life groups became very active. A public discussion on how to regulate abortions followed. Upon their petition, the Constitutional Court also discussed the issue, and in 1991 it issued a resolution on the constitutional principles of the regulation of abortions [64/1991, (XII. 17) Abh.]. The ruling says that banning abortions would run contrary to women's right of self-determination but that no abortion may be carried out without a good reason because the life of the fetus deserves protection. In 1992 the Hungarian Parliament adopted an abortion law that was compatible with those principles and can be described as moderately restrictive by European standards. In Hungary, abortion is permitted if at least one of the reasons enumerated in the law applies and the pregnant woman attends a counseling center. The law provides that abortion may not be performed before the third day after the relevant form is filled in and the pregnant woman has attended counseling. Few other European states require that all these conditions should be jointly met.

Under Hungarian law the fetus is not a rights-bearing person, live birth being the starting-point for personhood. The fetus enjoys certain legal protection, though. There are limitations in the way of abortion. In the same manner as in numerous other European countries, the Hungarian Criminal Code provides (in Article 169) that abortion conducted in violation of the relevant rules is a crime. To protect the fetus, both the doctor and the pregnant woman face stiff sanctions – imprisonment – if they carry out abortion illegally. Abortion is only allowed when good reasons are available and, following the twelfth week of pregnancy, very strong reasons are required. In sum, the law honors women's right of self-determination and protects the value of fetal life against unjustified abortions.

The abortion law Hungary introduced in the early 1990s is the result of a reasonable agreement. The bill was approved by 73% of the Members of Parliament present even though a much stricter version of the law had also been proposed for a vote. The outcome of the parliamentary vote coincided with the way the majority of Hungarians viewed this issue. Surveys show that in the past two decades 70 to 75% of the adult population have favored the abortion rules that have been in force or would even support more permissive ones.

The Constitutional Court subjected the law to constitutional review in the Fall of 1998 [48/1998. (XI.23) Abh.]. The Court resolved that it is not unconstitutional to permit abortion on the ground of "situation of grave danger". It resolved, furthermore, that the state must not inquire into the

facts of that situation provided that it does justice to its obligation to protect the value of fetal life in some other manner. According to the ruling, it is mainly by way of more extended counseling and of greater help to the pregnant women in crisis that this obligation can be honored. The ruling did not exclude, however, the possibility that the woman seeking an abortion be compelled to reveal the facts of her "situation of grave danger".

Banning abortion as a tool for population policy

In Hungary, the number of live births has been declining since 1981. Over the past two decades they are below the number of deaths. In a similar manner to other relatively developed countries, Hungary's population is on the decline, and its age composition is getting less and less favorable. This demographic tendency has been among the concerns of the anti-abortionists. The Hungarian Civil Liberties Union is of the view that the state must not restrict abortions on the grounds that reversing demographic tendencies is at stake.

Whether a couple decide to have a child has no direct impact on the total number of live births and has no measurable influence on other people's decisions with regard to having children. An individual decision is only a chance component of a statistical whole and has no tangible influence on the overall statistical pattern. Hence, there is no compelling state interest to interfere with family planning on the grounds of demographic concerns. Contraception is a private affair, and so is – from the viewpoint of population policy – the termination of pregnancy.

Moreover, there is no direct correlation between the permissiveness of the abortion rules and the number of abortions. In Europe, the number of abortions is the lowest in The Netherlands and the Scandinavian countries – and that is where the relevant rules are the most permissive. By contrast, in the 1980s, the number of abortions was the highest in Ceausescu's Romania where (apart from Ireland) the rules were the harshest. Stiffening the rules is not a successful means to discourage abortions. On the other hand, there is strong negative correlation between abortion and the public attitude to birth control (sex education and the availability of contraceptives).

Restrictive abortion policy is not an efficient tool for exerting a lasting influence on the number of live births. In case the number of abortions is high, that can be remedied by promoting birth control culture rather than by prohibition. When awarding support for the families and for mothers, the principle of equity and needs test should be applied.

The HCLU opposes making abortion rules stricter

In Hungary, since the adoption of the latest abortion law in 1992, pro-life groups have repeatedly asked for a more restrictive abortion law. They supported their claim by stating on the one hand that life is sacred and, on the other, that Hungary's population is on the decline. The HCLU believes that the demanded restrictions would not yield the expected results, and would have rather harmful social consequences. Moreover, they would violate women's right to self-determination, privacy and freedom of conscience.

- A restrictive abortion policy would not bring the desired result because the number of abortions would go down slower than the way the number of illegal abortions would grow.

(Before the 1970s, when abortion rules were restrictive in the majority of democratic countries, the number of illegal abortions was very high.)

- The number of deaths and of serious health impairment related to abortions would grow. There would be more suicides by pregnant women. The number of children placed in state care and of outcast children would steeply grow.
- If restrictions on abortion became harsh, rape victims, girls under 18 and women in grave crisis situation would also be compelled to give life their children. Moreover, mothers would be obliged to give life to children with serious inborn deficiencies.
- Such restrictions would make it impossible to use contraceptive devices that prevent the implantation of a fertilized egg in the uterine lining (contraceptive pill, coil).
- In vitro fertilization (test-tube conception) would also have to be banned in order to avoid the necessity to destroy a large number of fertilized eggs because, in order to ensure that implantation of the embryo in the uterine wall, more eggs are fertilized than introduced through the cervix into the uterus.
- If the rules of abortion were made stricter, that would seriously violate women's right of control over their own body and life course. The state would overstep its authority: it is off-limits in people's bedrooms and in women's private affairs.
- If a world view biased against abortion would dictate the law, the state would not remain neutral between people with conflicting convictions in the issue, and women would be forced to carry their pregnancy to term because other people do not share their conception of the good life.
- An official examination of the facts of the "situation of grave crisis" would violate privacy. The state has no authority to decide whether the woman's reasons for terminating pregnancy are appropriate.
- Pre-abortion counseling cannot reach its goal and it cannot avoid violating individual rights unless it is fully voluntary, and is free of any pressuring, is conducted in the spirit of due respect for personal secrets, and those providing it are well-trained and non-biased professionals.

In sum, the policy of restrictions would not yield the desired decline in abortion numbers, and it would be rights-violating. Alternatively, the state can maintain the regulation in force. The law as it stands belongs to that family of legal regulations which emphasize that the woman's right to self-determination has to be honored, and, at the same time, demand consideration to the value of the fetal life. That is in line with European norms and prevalent European legal practice. Moreover, it is in harmony with the expectations of the greater part of the Hungarian general public.